IN THE

Supreme Court of the United States

October Term, 1950.

No. 635

BEN WILLIAMSON, JR., Trustee of INLAND GAS CORPORATION,

Petitioner,

(Plaintiff-Appellant, Below),

v.

COLUMBIA GAS & ELECTRIC CORPORATION,

Respondent,

(Defendant-Appellee, Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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v.

COLUMBIA GAS & ELECTRIC CORPORATION,

Respondent,
(Defendant-Appellee, Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ben Williamson, Jr., Trustee of Inland Gas Corporation, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a judgment entered in the above-captioned cause on December 28, 1950.

A certified transcript of the record, including the proceedings in the said United States Court of Appeals, is presented herewith in accordance with Rule 38 of this Court.

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED.

The matter involved is whether a dismissal of a complaint seeking three-fold damages in a cause of action given under Section 7 of the Clayton Act bars, as *res judicata*, an action for three-fold damages in a cause of action given under Section 1 or Section 2 of the Sherman Act. Also involved is whether a federally-created right enforceable at law in a federal court should be barred by a State statute of limitations when there is no applicable federal statute of limitations.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 1254 (1). The judgment of the United States Court of Appeals for the Third Circuit was entered on December 28, 1950. R. 223 . This petition will be presented within ninety days from that date.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 186 F. 2d 464, Adv. Sheets. R. 213 . The opinion of the District Court is reported at 91 F. Supp. 874. App. 125a.

STATEMENT.

Foreword.

We believe this court is entitled to know the reasons this action was not brought on for hearing in the district court at an early date. The matter was continued for many years by mutual agreement. The reasons are, in the main, quite fully set forth in the Affidavit of Arthur G. Logan, filed in support of a motion to restore the case to the calendar, which motion was filed on January 9, 1947. App. 50a.

This affidavit tells of the proceedings between the parties hereto in the District Court of the United States for the Eastern District of Kentucky.

The stipulation of August 8, 1944, referred to in the Affidavit of Arthur G. Logan, is one which allows the use on the trial of this case of all the depositions and testimony of witnesses taken in connection with the proceedings had and the trial of the issues in the Kentucky District Court. This leaves for final determination in this proceeding only the question of damages, because in the Kentucky proceedings, and particularly the decisions of the Circuit Court of Appeals for the Sixth Circuit (see 122 F. 2d 223 and 151 F. 2d 461, cert. den. 329 U. S. 737), it has been established that defendant, Columbia Gas & Electric Corporation, hereinafter called "Columbia," did violate the anti-trust laws by committing the acts alleged in the amended complaint in the instant case and that injury resulted from these violations.

The United States Government intervened in the proceedings in the Kentucky District Court and took an active part in the trial which resulted in the subordination of claims of Columbia. See 151 F. 2d 461, cert. den. 329 U. S. 737.

Nature of the Proceeding.

The amended complaint in this cause seeks three-fold damages for injuries to the business and property of Inland Gas Corporation, hereinafter called "Inland," and the trustees thereof, caused by the acts of Columbia forbidden by Sections 1 and 2 of the Sherman Anti-Trust Act, 26 Stat. 209; as amended by 50 Stat. 693. 15 *U. S. C. A.*, Secs. 1 and 2. App. 3a. The defendant filed an amended motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. App. 56a. This amended motion urges two reasons for a dismissal of the amended complaint, viz.: (1) that an order entered by the district court on April 29, 1939, in an action entitled, "Ben

Williamson, Jr. Trustee of Inland Gas Corporation, a Delaware corporation, plaintiff, v. Columbia Gas & Electric Corporation, a Delaware corporation, defendant.", Civil Action No. 1, constitutes an adjudication of the causes of action asserted in this proceeding; and (2) that the causes of action asserted in this proceeding are barred by limitations. The district court held that this action is barred by the adjudication in the dismissed action and stated that in view of such conclusion there was no occasion to pass upon the question of limitations. App. 135a. 91 F. Supp. 874. A judgment was entered dismissing the amended complaint. App. 135a. An appeal was taken from said judgment to the United States Court of Appeals for the Third Circuit. The judgment was affirmed. 186 F. 2d 464.

Chronological Statement Pertaining to This Action.

The instant action was brought in the United States District Court for the District of Delaware on February 14, 1938, before the Federal Rules of Civil Procedure went into effect. It was brought by Ben Williamson, Jr., as Trustee, under Section 77-B of the Bankruptcy Act, of Inland Gas Corporation, against Columbia, two of Columbia's subsidiaries, and 44 individuals. Only Columbia and one of the individuals were summoned. The original declaration contained two counts, each setting forth an action on the case. The first count charged a violation by the defendant of 15 *U. S. C. A.* § 1, 26 Stat. 209; as amended by 50 Stat. 693, commonly known as Section 1 of the Sherman Act. The second count charged a violation of 15 *U. S. C. A.* § 2, 26 Stat. 209, commonly known as Section 2 of the Sherman Act. The counts alleged that contrary to Sections 1 and 2 of the Sherman Act Columbia had conspired with the other defendants to restrain and monopolize trade and commerce in natural gas throughout Indiana, Ohio, southern Michigan, southwestern Pennsylvania, the western part of West Virginia and the northeastern part

of Kentucky. The counts also alleged that the conspiracy under Section 1 and the conspiracy under Section 2 each *"has been and is a continuing one."* Each count spelled out the illegal conspiracy, the injuries which Inland and its trustees had suffered due to the violations of said sections and the damages which had resulted.

On October 5, 1938, plaintiff, with leave of court, amended the declaration to conform to the then new Federal Rules of Civil Procedure. The complaint named only Columbia as a defendant. It charged in paragraph 5 that Columbia had conspired, contrary to Sections 1 and 2 of the Sherman Act, with the other defendants originally named, that is, the two subsidiaries and the 44 individuals, who were all called co-conspirators. The causes of action were based on the same violations of Section 1 and Section 2 of the Sherman Act as set out in the original declaration.

On October 25, 1939, plaintiff filed an amended complaint restating a civil action against Columbia in the form required by the Federal Rules of Civil Procedure. The causes of action set forth in it are based on the same violations of Section 1 and Section 2 of the Sherman Act that were set forth in the original declaration and in the complaint.

On May 9, 1949, Columbia filed the amended motion for summary judgment. App. 56a. It was this motion, referred to in the Nature of the Proceeding, which the district court granted. This amended motion raised the defense for the first time that the order entered by the district court on April 29, 1939, in the action entitled "Ben Williamson, Jr., Trustee of Inland Gas Corporation, a Delaware corporation, plaintiff, v. Columbia Gas & Electric Corporation, a Delaware corporation defendant.", Civil Action No. 1, constituted an adjudication of the causes of action asserted in this proceeding.

Hereinafter, we will refer to the instant action as the *"First Action."* We will refer to the action involving In-

land in which the order of April 29, 1939, was entered as the *"Second Action."*

Chronological Statement Pertaining to Second Action.

On September 16, 1938, when the Federal Rules of Civil Procedure became effective, the "Second Action" was filed by Ben Williamson, Jr., as Trustee, under Section 77-B of the Bankruptcy Act, of Inland Gas Corporation, against Columbia. The complaint charged a violation by Columbia of 38 Stat. 731, 15 *U. S. C. A.*, Sec. 18, commonly known as Section 7 of the Clayton Act. App. 60a. It was filed in the belief that the new Federal Rules of Civil Procedure would prevent the Delaware statute limiting forms of personal actions, including the three-year limitation upon the action upon the case, from being available to defendants. See Affidavit of Arthur G. Logan in opposition to amended motion for summary judgment. App. 120a.

The complaint alleged that on November 6, 1930, Columbia, while engaged in commerce pertaining to the production, transmission, distribution and sale of natural gas, acquired indirectly, contrary to Section 7 of the Clayton Act, a majority of the outstanding common stock of Inland, which corporation at said time was also engaged in such commerce, and that the effect of such acquisition had been to substantially lessen competition between Inland and Columbia and had restrained commerce within and between the States of West Virginia, Kentucky, Ohio and Michigan, and had created a monopoly in commerce pertaining to the production, transmission, distribution and sale of natural gas. The complaint also spelled out the injuries which Inland and its trustees had suffered due to such violation, and the damages which had resulted.

On November 15, 1938, plaintiff, through his attorney, and Columbia, through its attorney, entered into the following stipulation *to allow a test of the question as to what, if any, statute of limitations would bar a Civil Action:*

"STIPULATION

"And now, to wit, this fifteenth day of November, A. D. 1938, it is hereby stipulated by and between counsel for the respective parties, subject to the approval of the Court, as follows:

"1. The motion of the defendant hereto annexed shall be heard and determined by the Court prior to the filing herein by the defendant of any responsive pleading with the same effect as though the said motion presented a defense falling within the terms of Rule 12-B of the 'Rules of Civil Procedure for the District Courts of the United States.'

"2. The parties agree that the alleged right of action sued upon in its cause accrued not later than January 1, 1931, and if, upon hearing the said motion, the Court shall be of the opinion that the said action is barred by any applicable statute of limitations, the said motion shall be granted; otherwise it is expressly agreed that the defendant may file its answer or any further motion in the cause which it may desire to make, and the time within which the defendant shall file its answer or any such motion shall be fixed by the Court.

(Sgd.) ARTHUR G. LOGAN,
Attorney for Plaintiff.
(Sgd.) C. A. SOUTHERLAND,
Attorney for Defendant."
(App. 99a.)

The motion annexed to the stipulation reads as follows:

"MOTION TO DISMISS

"Columbia Gas & Electric Corporation, the defendant above named, by Clarence A. Southerland, its attorney, now moves the Court as follows:

"1. To dismiss the complaint herein for failure to state a claim upon which relief can be granted on the ground that the cause of action, if any, alleged therein against the defendant did not accrue within a period of three years prior to the commencement of this action.

(Sgd.) C. A. SOUTHERLAND,
Attorney for Columbia Gas & Electric Corporation."
(App. 100a.)

The foregoing motion to dismiss and stipulation were filed on November 16, 1938. App. 99a, 100a. A hearing was had on the stipulation and motion. The court held that, based on the stipulation, the action was barred by the Delaware three-year statute of limitations. Therefore, under the terms of the stipulation, the motion had to be granted. App. 101a. 91 F. Supp. 874.

On April 29, 1939, the following order was entered:

"ORDER DISMISSING COMPLAINT

"And now, to wit, this twenty-ninth day of April, A. D. 1939, the above-entitled cause coming on to be heard *upon the motion* of the defendant to dismiss the complaint filed in the above-entitled cause, *and upon the stipulation* of counsel filed in connection with the said motion, and counsel having been fully heard in the premises, it is

"ORDERED BY THE COURT that the complaint in the above-entitled cause be and it is hereby dismissed, with costs against the plaintiff.

(Sgd.) JOHN P. NIELDS, *J.*"
(Emphasis supplied; App. 119a.)

An appeal was taken. The United States Court of Appeals affirmed (110 F. 2d 15). This Court denied certiorari (310 U. S. 639; May 27, 1940).

The order set forth above dismissing the complaint specified that the cause had come on to be heard upon the motion of the defendant to dismiss the complain and upon the stipulation of counsel. This specification in the order, considered in the light of the stipulation itself, and the opinion of the court, shows the limited nature of the hearing. (See also Affidavit of Arthur G. Logan in opposition to amended motion for summary judgment, App. 120a.)

The hearing in the Second Action was merely one to test whether or not a cause of action arising out of a violation of Section 7 of the Clayton Act, through the acquisition of stock, etc., as aforesaid, would be barred by any statute of limitations where, as the stipulation provided, the cause of action had accrued not later than January 1, 1931, which was more than seven years prior to the filing of the action. The judgment was merely that a cause of action given by Section 7 of the Clayton Act would be barred in Delaware if filed more than three years after it accrued. Columbia now seeks to use this limited judgment as a bar to the "First Action," which involves causes of action based on violations of Sections 1 and 2 of the Sherman Act and which in the amended complaint are alleged to have continued at all times from 1928 to the date of the filing of the amended complaint.

EFFECT OF DECISION.

The effect of the decision of the District Court and the Court of Appeals has been to prevent a consideration at this time of the question of whether or not an action at law created by a federal statute can be barred in a federal court by a State statute of limitations when there is no applicable federal statute of limitations. The District Court stated it was unnecessary to pass upon the question of limitations because of the holding that the action was barred under the doctrine of *res judicata*. The Court of Appeals affirmed the District Court and in doing so only considered the applica-

tion of the rules of *res judicata*. The earlier Second Action was dismissed after the District Court and the Court of Appeals held that the Delaware three-year statute of limitations applied to an anti-trust action in the Delaware District Court. This ruling was prior to the decision of this Court in the case of *Holmberg v. Armbrecht*, 327 U. S. 392, 90 L.Ed. 743, where the rule was adopted that a State statnte of limitations cannot be availed of to bar enforcement of a suit in equity in a federal court on a federally-created right. The same rule should apply on the law side, and hence the error of the courts below in dismissing the Second Action on the theory it was barred by the Delaware statute of limitations is perpetuated and applied to the First Action through the application of the *res judicata* doctrine. If the ruling in the *Holmberg* case is enlarged to encompass federally-created rights when the same are being enforced at law, petitioner will have been unjustly dealt with by the prior adjudication in the Second Action, and it would be unfair to hold that such prior adjudication is conclusive and binding on petitioner. Just because the adjudication was earlier in time than the *Holmberg* case and the suggested enlargement of that ruling, it should not be used to defeat petitioner's right of action.

QUESTIONS PRESENTED.

1. Can a Dismissal of a Complaint Seeking Three-Fold Damages in a Cause of Action Given Under Section 7 of the Clayton Act Bar, as *Res Judicata*, an Action for Three-Fold Damages in a Cause of Action Given Under Section 1 or Section 2 of the Sherman Act?

2. Shouldn't the Rule Adopted in *Holmberg v. Armbrecht*, 327 U. S. 392, 90 L. Ed. 743, that State Statutes of Limitations Cannot Be Availed of to Bar Enforcement of Suits in Equity in a Federal Court on a Federally-Created Right Be Enlarged to Apply on the Law Side as Well and, if so, Should not Petitioner Be Relieved from the Effects of the Prior Adjudication?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The judgment of the United States Court of Appeals is on important questions of federal law which have not been, but should be, settled by this Court.

2. The United States Court of Appeals decided a federal question in a way probably in conflict with applicable decisions of this Court.

3. The questions presented are novel ones and clearly have sufficient importance to warrant determination by this Court.

4. The Second Action, which was dismissed and which dismissal gives rise to the contention that the First Action should be dismissed under the doctrine of *res judicata,* was dismissed because the courts below held that the Delaware three-year statute of limitations applied. The action was for a violation of the anti-trust laws, a federally-created right. There is no applicable federal statute of limitations. State statutes of limitations should not be availed of to bar enforcement in a Federal Court of a federally-created right. This Court should review the matter and hold that petitioner's federally-created rights cannot be barred in the Delaware District Court because of the Delaware statute of limitations and that the prior adjudication in the First Action is not *res judicata.*

PRAYER.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Third Circuit or, if its mandate has gone down, to the United States District Court for the District of Delaware, commanding the Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of

the record and all proceedings in the case in said Circuit Court numbered and entitled on its docket No. 10270, *Ben Williamson, Jr., Trustee of Inland Gas Corporation, Appellant, v. Columbia Gas & Electric Corporation,* and that the said judgment of the United States Court of Appeals for the Third Circuit affirming the decree of the District Court and dismissing said appeal may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION,
Petitioner,

By ARTHUR G. LOGAN,
Continental American Building,
Wilmington, Delaware,
Attorney.

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v.

COLUMBIA GAS & ELECTRIC CORPORATION,

Respondent,

(Defendant-Appellee, Below),

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The final date of the judgment to be reviewed is the date of the order entered by the United States Court of Appeals, which date is December 28, 1950 (see judgment annexed to the printed record. R. 223 .). The judgment was rendered in a Civil Action brought under the anti-trust laws for three-fold damages.

The statute under which the jurisdiction of this Court is invoked is 28 U. S. C. A., Section 1254 (1).

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 186 F. 2d 464, Adv. Sheets. R. 213 . The opinion of the District Court is reported at 91 F. Supp. 874. App. 125a.

STATEMENT OF THE CASE.

The matter set forth in the Statement in the foregoing petition is incorporated herein by reference. See pages 2 to 9, *supra.*

QUESTIONS PRESENTED.

1. Can a dismissal of a complaint seeking three-fold damages in a cause of action given under Section 7 of the Clayton Act bar, as *res judicata,* an action for three-fold damages in a cause of action given under Section 1 or Section 2 of the Sherman Act?

2. Shouldn't the rule adopted in *Holmberg v. Armbrecht,* 327 U. S. 392, 90 L. Ed. 743, that State statutes of limitations cannot be availed of to bar enforcement of suits in equity in a Federal Court on a federally-created right be enlarged to apply on the law side as well and, if so, should not petitioner be relieved from the effects of the prior Adjudication?

ARGUMENT.

I. The Dismissal of a Complaint Seeking Three-fold Damages in a Cause of Action Given Under Section 7 of the Clayton Act Cannot Bar, as Res Judicata, an Action for Three-fold Damages in a Cause of Action Given Under Section 1 or Section 2 of the Sherman Act.

A. This Court, The Court of Appeals Itself and Various District Courts Have so Held.

In *United Shoe Machinery Corp. v. United States,* 258 U. S. 451, 66 L. ed. 708, this precise point was decided. That case was a suit in equity brought by the United States against various parties alleging a violation of Section 3 of the Clayton Act and seeking an injunction against the defendants from making leases containing certain clauses, terms and conditions alleged to be violative of said section. The court said:

> "It is contended that the decree in favor of the defendants, affirmed in the former suit of the government under the Sherman Act (247 U. S. 32, 62 L. ed. 968, 38 Sup. Ct. Rep. 473), between the same parties, is res judicata of the issues in the present case.
>
> "Perhaps the leading case in this court upon the subject of estoppel by former judgment is Cromwell v. Sac County, 94 U. S. 351, 352, 24 L. ed. 195, 197, in which this court, speaking by Mr. Justice Field, laid down the general rule of law, which has been followed in subsequent cases:
>
> > "'. . . there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits,

> constitutes an absolute bar to a subsequent action . . . concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates at an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined.'

"In other words, to determine the effect of a former judgment pleaded as an estoppel, two questions must be answered: (1) Was the former judgment rendered on the same cause of action? (2) if not, was some matter litigated in the former suit determinative of a matter in controversy in the second suit? To answer these questions we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy.

"The Sherman Act suit had for its object the dissolution of the United Company, which had been formed by the union of other shoe machinery companies. It also attacked and sought to enjoin the use of the restrictive and tying clauses contained in the leases as being in themselves contracts in violation of the Sherman Act. The Sherman Act and the Clay-

ton Act provide different tests of liability. This was determined in the recent case of Standard Fashion Co. v. Magrane-Houston Co. decided April 10, 1922, 258 U. S. 346, ante, 653, 42 Sup. Ct. Rep. 360. In that case we pointed out that the Clayton Act was intended to supplement the Sherman Act, and within its limited sphere established its own rule. Under the Sherman Act, as interpreted by this court before the passage of the Clayton Act, contracts were prohibited which unduly restrained the natural flow of interstate commerce, or which materially interrupt the free exercise of competition in the channels of interstate trade. In the second section monopolization or attempts to monopolize interstate trade were condemned. The Clayton Act (§ 3) prohibits contracts of sale, or leases made upon the condition, agreement, or understanding that the purchaser or lessee shall not deal in or use the goods of a competitor of the seller or lessor, where the effect of such lease, sale, or contract, or such condition, agreement, or understanding, 'may' be to substantially lessen competition or tend to create monopoly. *The cause of action is therefore not the same.*" (Emphasis supplied.)

This decision, squarely in point, was rendered in a suit in equity where there would be a greater latitude than in an action at law dealing with causes of action. This strengthens the decision as being one clearly holding that the causes of action given by the various sections of the anti-trust laws are not the same, and a decision involving a cause of action given by one section cannot bar an action given by another section.

The Court of Appeals and the District Court said that this decision was not controlling because a governmental right-of-action and not a private right-of-action was involved.

In *Buckeye Powder Co. v. E. I. duPont deNemours Powder Co.* (C. C. A., 3rd, 1915), 223 Fed. 881, aff'd. 248

U. S. 55, 63 L. ed. 123, the declaration in an anti-trust action seeking treble damages contained only one count in which the defendants were alleged to have violated both Section 1 and Section 2 of the Sherman Act. The defendants moved to strike on the ground of duplicity. The contention was that the two sections gave three separate and distinct causes of action: "the making of unlawful agreements, the entering into unlawful combinations, and the maintenance of a practically complete monopoly." The District Court said:

> "If in so doing the pleader has combined two or more distinct causes of action the pleading is bad for duplicity." (196 Fed. 517. Citing *Rice v. Standard Oil Co.*, discussed *infra.*)

The District Court held, however, that only one cause of action was involved as the declaration only complained of the defendant's conspiracy to monopolize, condemned by Section 2 of the Sherman Act. The case proceeded to trial. The trial lasted five months, at the end of which time the question was raised again and "the trial judge required it (plaintiff) to elect whether it would insist before the jury on a violation of section 1 of the Anti-Trust Act, or on a violation of section 2." (223 Fed. 886.) On appeal the plaintiff alleged as error the action of the District Court in requiring it to elect. The Court of Appeals held the action of the trial judge was justified on the theory that a declaration would be bad for duplicity if in one count more than one of the causes of action given by the Sherman Act were combined. This Court, speaking through Mr. Justice Holmes, who had sat in the *United Shoe Machinery Corp.* case, *supra*, approved the action of the other courts as he said the declaration only charged a violation of Section 2, and the trial had proceeded on that theory. His opinion clearly indicates that the sections create different causes of action.

In *Rice v. Standard Oil Co.*, 134 Fed. 464, a motion to strike out a declaration in an anti-trust action seeking treble damages was granted. There, the declaration alleged a violation of Section 1 of the Sherman Anti-Trust Act and in one count relied on the first clause of Section 1 relating to contracts, and also the second clause relating to "a combination in the form of a trust and conspiracy." The court said:

> "Here the pleader makes the two distinct offenses condemned by the act the basis of his complaint. This contravenes the rule which forbids duplicity in pleading." (134 Fed. 468.)

In the *Buckeye Powder Co.* case, *supra*, the Court of Appeals approved of this action, saying:

> "The question of duplicity was thus raised at an early stage, and as a result of that decision an amended declaration was afterwards filed. But this also contained only one count, and as Judge Lanning (sitting in the Circuit Court for the District of New Jersey) had already decided in Rice v. Standard Oil Co. (C. C.) 134 Fed. 464, that a declaration in a similar suit under the same section was bad for duplicity because it combined two causes of action in one count, we think the trial judge was sufficiently justified in requiring the plaintiff to elect." (223 Fed. 886.)

In Baran v. Goodyear Tire and Rubber Co., et al., 256 Fed. 570, in an action for treble damages a motion was filed to compel the separate statement of "commingled causes of action, respectively based on the Sherman Anti-Trust Act and on the Clayton Act." Judge Augustus N. Hand granted the motion saying:

> "The complaint sets out in one cause of action facts which may be regarded as violations of the Sherman Anti-Trust Act (Act of July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. §§ 8820-8823, 8827-8830]) and the Clay-

ton Act (Act of Oct. 15, 1914, c. 323, 38 Stat. 730). Some of them apparently violate one of these acts, and some may violate both. These are separate acts, and remain so in spite of certain clauses of the Clayton Act which relate to both. I think the defendants are entitled to have these commingled causes of action separately stated, so that they may better prepare for trial and have the advantage by demurrer of eliminating one from consideration if a demurrer should be sustained."

In *La Chappelle v. United Shoe Machinery Corp.*, 13 F. Supp. 939, in an action for treble damages the court, in commenting on the *Baran* case, said:

> "In the case of Baran v. Goodyear Tire & Rubber Company (D. C.) 256 F. 570, which is relied upon by the defendant as a ground of demurrer, the complainant set out in one cause of action facts which in reality constituted two causes of action; had intermingled violations of the Clayton Act (38 Stat. 730) with violations of the Sherman Act (15 U. S. C. A. §§ 1-7, 15 note); and the court ordered a separation of these causes of action."

In *Seaboard Terminals Corp. v. Standard Oil Co.*, 15 F. Supp. 1085, which was a treble damage action, a motion was filed to separately state causes of action under the Clayton Act from causes of action under the Sherman Act. The court denied the motion after determining that the complaint only charged a violation of the Sherman Act.

In *Hansen Packing Co. v. Armour & Co.*, 16 F. Supp. 784, which also was an action for treble damages, a motion was filed to require the plaintiff to separately state and number causes of action under the Sherman Act and under the Clayton Act. The court said:

> "The Illinois Corporation moves under rule 90 of the Rules of Civil Practice for judgment requiring the plaintiff separately to state and number, in each of its

alleged causes of action, the cause of action under the Sherman Anti-Trust Act and the cause of action under the Clayton Act.

"In each of the two causes of action the plaintiff charges the Illinois Corporation with violations of the Sherman Anti-Trust Act and of section 2 of the Clayton Act. In his memorandum in opposition to the defendant's motion, the plaintiff explains that he is seeking recovery only for the defendant's alleged price discrimination; nevertheless, the right to recover is predicated upon both the Sherman Anti-Trust and Clayton Act. Contention is made that each part sets up a single cause of action despite the alleging of both statutes. However, in Baran v. Goodyear T. & R. Co., 256 F. 570 (D. C. S. D. N. Y. 1918), an almost identical problem was passed upon, and the present case is an a fortiori situation in that the plaintiff has no remedy at all under the Sherman Anti-Trust Act for price discrimination, whereas in the Baran Case the plaintiff might have had a cause of action under the Sherman Anti-Trust Act. See, also, Ware-Kramer Tobacco Company v. American Tobacco Company (C. C.) 178 F. 117. The plaintiff's reliance on Payne v. New York, S. & W. R. R. Co., 201 N. Y. 436, 95 N. E. 19, is misplaced, since *a decision under one of the anti-trust statutes would not be res judicata in a suit under the other.* See United Shoe Machinery Corporation v. United States, 258 U. S. 451, 42 S. Ct. 363, 66 L. Ed. 708. Certainly a decision on price discrimination under the Clayton Act would not be res judicata in a suit under a statute giving no such remedy. This motion is granted." (Emphasis supplied.)

The courts below disregarded all of these cases in arriving at the conclusion that the instant causes of action based on violations of Sections 1 and 2 of the Sherman Act,

were the same cause of action as the one based on Section 7 of the Clayton Act.

In the opinion by Judge Maris on the earlier appeal taken by the plaintiff here against Columbia, we submit that there was a determination that the cause of action in that "Second Action" was a separate, distinct and new cause of action from any possible cause of action in this "First Action." After pointing out that the purchase of stock control by one corporation in another, so as to lessen competition, made illegal by Section 7 of the Clayton Act, would have been against public policy prior to the enactment of the Clayton Act, he said:

> "The anti-trust legislation extended this protection to the individual, and gave him a right of action for injuries sustained by him which up to that time had received no judicial recognition. * * * We are of the opinion that the *cause of action* given by Section 7 of the Clayton Act fits into that broad field of tort law which protects a man's business from wrongful interference. * * * The statute simply makes an addition to this group of recognized torts."
>
> (110 F. 2d 15, at 17; emphasis supplied.)

In other words, Judge Maris held that Section 7 gave a *new* cause of action, which of course would not be the same cause of action previously existing under the provisions of the Sherman Act.

B. A Comparison of the Statutes Here Involved Makes It Clear That the Cause of Action Asserted in the Second Action Was Separate and Distinct From the Causes of Action Asserted in This First Action.

When the Sherman Act was passed in 1890 it contained in Section 7 the following:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlaw-

> ful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The permission contained in this section was, of course, limited to the Sherman Act.

The Clayton Act was passed in 1914 as "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes." It provides in Section 4 as follows:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

This Section 4 is 38 Stat. 731, 15 U. S. C. A. § 15. The historical note to this section in the Code states:

> "This section applies to the provisions of this chapter generally and supersedes two former similar sections enacted by act July 2, 1890, c. 647, § 7, 26 Stat. 210 and act Aug. 27, 1894, c. 349, § 77, 28 State. 570, each of which were restricted in operation to the particular act cited."

In other words, 38 Stat. 731, 15 U. S. C. A. § 15, which was passed as part of the Clayton Act, is the enabling section of all the anti-trust laws giving private parties who are injured the right to sue and recover three-fold damages. It gives people who are injured "by reason of anything forbidden in the anti-trust laws" the right to sue. This means that if the injuries are caused by a violation of

Section 1 or by Section 2 of the Sherman Act, or by Section 7 of the Clayton Act, a right to sue springs up.

The pertinent provisions of Section 1 of the Sherman Act which, if violated, give rise to a cause of action to a person who is injured, read:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *."

As pointed out above (*supra*, pp. 13 to 17), the courts have considered that this section may give two or three distinct causes of action.

Section 2 of the Sherman Act states:

> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

In *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, we find an exhaustive study of the history of monopolies preceding the passage of the Sherman Act and the reasons for the passage thereof, and a discussion of the differences between Sections 1 and 2, and the objectives each section was designed to reach. This court concluded that Section 2 "was intended to be, the complement of the 1st." (221 U. S. 62, 55 L. ed. 645.) The Sherman Act gave new causes of action.

The Clayton Act, passed "to supplement existing" anti-trust laws, gave still additional new causes of action to persons injured by a violation of the condemned actions. The pertinent part of Section 7 of the Clayton Act with which we are concerned reads:

> "Sec. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

This created a new cause of action, as Judge Maris pointed out in the opinion in the "Second Action." He said, speaking of Section 7 of the Clayton Act:

> "This *new right of action* * * * given by the statute was for a tort. We are of the opinion that the cause of action given by Section 7 of the Clayton Act fits into that broad field of tort law which protects a man's business from wrongful interference." (110 F. 2d 15, at 17; emphasis supplied.)

It would seem that only a casual reading of these three sections of the anti-trust laws makes it abundantly clear that an injury through a violation of one of the sections would give rise to a cause of action different from a cause of action arising through an injury caused by a violation of another section.

Section 1 of the Sherman Act condemns contracts and combinations and conspiracies in restraint of trade. Section 2 condemns people who monopolize or attempt to monopolize or conspire to monopolize part of the trade or commerce among the States.

Section 7 of the Clayton Act condemns the acquisition of stock "where the effect of such acquisition may be to substantially lessen competition" between the corporation acquiring the stock and the corporation whose stock is acquired.

The "Second Action" was based upon Section 7 of the Clayton Act. This "First Action" is based on Sections 1

and 2 of the Sherman Act. Certainly unless one of these actions is demurrable for failure to allege a violation of the law upon which it is based, they are distinct and cannot be the same causes of action. By that we mean that as the "Second Action" was based on Section 7 of the Clayton Act, the numerous facts set forth in the complaint must, if tested as to their sufficiency, establish a violation of Section 7, or the complaint would be demurrable. On the other hand, in the "First Action" the numerous facts alleged must, if tested as to their sufficiency, establish violations of Sections 1 and 2, or the amended complaint would be demurrable. If neither the complaint nor the amended complaint is demurrable, then we have a situation where the facts alleged in the complaint in the "Second Action" establish an action based on Section 7 of the Clayton Act, while the facts alleged in the amended complaint in the "First Action" establish an action based on Sections 1 and 2 of the Sherman Act. This shows clearly that different causes of action are involved.

In *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 71 L. ed. 1069, the court said:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show.
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> • • •
>
> " ' "The *thing*, therefore, which in contemplation of law as its *cause*, becomes a ground for action, is not the group of *facts* alleged in the declaration, bill or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*" ' *Chobanian v. Washburn Wire Company*, 33 R. I. 289, 302." (p. 321; italics in the original.)

If we apply this rule the result stands out that different causes of action spring up by violations of the different section of the anti-trust laws. The rights which a person enjoys through the protection of the anti-trust laws in this

country are several. First, there is the right granted by the enabling act (Sec. 4 of the Clayton Act) and by Section 1 of the Sherman Act that, taken together, one shall not be injured in his business or property through another's entering into a contract, a combination, or conspiracy in restraint of trade or commerce without being able to sue and recover three-fold damages. Upon someone unlawfully violating the Section and doing the condemned acts, a cause of action springs up if injury results. The cause of action arises by the unlawful violation of the proscribed actions causing injury. Before the Sherman Act was passed a person injured by another's doing the things not then proscribed was without redress. Likewise, now, mere injury to business as the result of acts of another not within proscribed classes creates no cause of action.

Section 2 grants a cause of action when there is an unlawful violation by monopolizing or attempting to monopolize.

Section 7 of the Clayton Act grants a cause of action when there is an acquisition of stock in the proscribed manner. The wrong constituting the invasion of a plaintiff's right is to acquire the stock in the proscribed manner.

In 1 *C. J. S.*, Actions, Sec. 8, p. 984, it is stated:

> "A cause of action, as defined with reference to its elements, consists of a primary right of plaintiff, a corresponding duty of defendant, and a wrong by defendant in breach of such right and duty."

The fact that many of the allegations in the complaint in this "First Action" are repeated in the complaint in the "Second Action" is of no significance.

> "The same facts may manifest the violation of separate and distinct legal rights, each giving rise to a separate cause of action."
>
> *Brooks v. Arkansas-Louisiana Pipe Line Co.*, 77 F. 2d 965, at 968.

In 2 *Freeman on Judgments,* 5th Ed., Sec. 594, the author says:

> "Separate causes of action may arise out of the same transaction, in which event a recovery or judgment in an action on one, does not ordinarily bar an action on the other. This is quite clear where the causes of action accrue * * * to the same person in different * * * rights."

In Section 595, the author points out that where several rights of action arise out of the same general situation with damages the same as we have here, the only limitation is that the courts will not allow a plaintiff to recover twice.

As, therefore, different causes of action are involved in this "First Action" from the one in the "Second Action," even though the facts involved are similar, as plaintiff had no recovery in the "Second Action," its dismissal is not a bar to this "First Action."

C. A Comparison of the Allegations Contained in the Complaint in the Second Action With Those Contained in the Amended Complaint in This First Action Shows Different Causes of Action Are Involved.

The "Second Action" was one in which plaintiff charged that Columbia, while engaged in commerce pertaining to the production, transmission, distribution and sale of natural gas, had acquired indirectly a majority of the outstanding common stock of Inland, which corporation at said time was also engaged in said commerce, and the effect of such acquisition had been to substantially lessen competition between the companies, restrain such commerce, and create a monopoly contrary to the provisions of Section 7 of the Clayton Act (par. 5). App. 61a.

Paragraphs 6 to 12, inclusive, App. 62a-98a, including the subparagraphs of paragraph 12, then set forth facts establishing the charges made in paragraph 5 and showing that Section 7 of the Clayton Act was violated by Columbia

and that Inland was injured therefrom and suffered damages because of said violations. The parties stipulated that the cause of action set forth in the complaint in the "Second Action" "accrued not later than January 1, 1931." App. 99a. This stipulation establishes that all the elements of the cause of action upon which the "Second Action" was based had come into existence prior to that date. The stipulation is conclusive of the fact that Columbia had, prior to January 1, 1931, been engaged in commerce pertaining to the production, transmission, distribution and sale of natural gas and had acquired indirectly a majority of the outstanding common stock of Inland (this was acquired on November 6, 1930), and that Inland at said time was also engaged in such commerce, and that the effect of such acquisition prior to January 1, 1931, had been to substantially lessen competition between the companies, had restrained such commerce, and had created a monopoly in Columbia, and that Inland had been injured due to these violations of law, and damages had arisen. We submit the facts alleged in the complaint clearly establish these points.

On the other hand, the allegations contained in the amended complaint in this "First Action" charge that Columbia conspired with two other corporations and 44 individuals to restrain and monopolize trade and commerce, contrary to the provisions of Sections 1 and 2 of the Sherman Act, and that by virtue of said conspiracy Inland and the trustees thereof were injured in their business and property (par. 5). App. 4a. After making this charge, paragraph 5 of the amended complaint reads:

> "Said conspiracy against Inland Gas Corporation and its Trustees, and the injury and damage by reason thereof, occurred under the following facts and circumstances, to wit: * * *." (App. 4a).

The facts establishing the conspiracy and the injury and damage are then set forth. The amended complaint does not charge a conspiracy consisting of one act or capable

of being consummated by one act. The amended complaint charges a continuing conspiracy by Columbia and the 46 co-conspirators to prevent the building of the natural gas transmission lines which the American Fuel & Power Company project contemplated should be built from Kentucky to Detroit, Michigan, through the territory in which Columbia enjoyed a monopoly [par. 5 (a)], App. 5a, and where it sold gas "at high rates" [par. 5 (b)], App. 8a, and to restrain and prevent such natural gas transmission lines from becoming competitors of the Columbia System in the transmission and sale of natural gas in the States of Kentucky, West Virginia, Ohio, Indiana and Michigan [par. 5 (c)]. App. 8a.

> "The object of said conspiracy was to prevent said program from being carried out and to acquire title in the name of Columbia, or one of its subsidiaries, to the gas reserves and transmission lines acquired, owned and built by the proponents of said project or, failing in the acquisition of title, to obtain absolute control and domination over the corporations which had been organized to carry out said project."
>
> [par. 5 (c); App. 9a.]

The amended complaint then alleges in paragraphs 5 (c) (1) to (25), inclusive, App. 9a-42a, the facts showing the American Fuel & Power Company project and the methods used by Columbia and its co-conspirators to prevent the same from being carried out. In these paragraphs we also find the injuries inflicted upon Inland and its trustees, and the damages resulting.

In paragraph 6, App. 42a, the amended complaint alleges "that the said conspiracy aforesaid to restrain and monopolize commerce in the transportation, distribution and sale of natural gas between and in Kentucky, West Virginia, Indiana, Ohio and Michigan has been and is a continuing one."

The facts set out in paragraphs 5 (c) (1) to (10), inclusive, App. 9a-20a, show the organization of Inland and the formation of the American Fuel & Power Company project. We find that Inland had assumed burdensome gas purchase contracts and was operating at a loss [par. 5 (c) (1), (4)]. App. 9a, 14a. The American Fuel project had for one of its purposes establishing new and larger gas markets for Inland [par. 5 (c) (5), (6)]. App. 14a. The pipe line to Detroit would have given Inland an enlarged market [par. 5 (c) (6), (7)], App. 15a, and would have given it a sufficient market to sell the gas Inland had contracted to buy. Inland would have been enabled to sell sufficient gas at prices which would have given Inland earnings sufficient to pay all fixed charges and sinking-fund requirements on its outstanding debt and to pay dividends on its stock [par. 5 (c) (10)]. App. 19a.

> "Had not the plans of said Syndicate been interrupted by Columbia, pursuant to said conspiracy hereinabove mentioned, in the manner hereinafter set forth, said pipe line would have been built and the gas called for by the contracts Inland had with Hamilton, Carbreath and Piney would have been transmitted to and sold in Detroit without any loss to Inland and Inland would have sold or would sell sufficient of its excess gas over that which has been sold and will be sold to its customers in northeastern Kentucky, West Virginia, Ohio, and vicinity at prices sufficient at all times after the completion of the line to pay its fixed charges, the sinking fund requirements on its outstanding bonds and debentures and dividends on its stock • • •.
>
> • • •
>
> "Inland had sufficient gas reserves to supply said amount of excess gas for sale in Detroit.
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> • • •
>
> "*From December 2, 1930, to the date of the institution of these proceedings* the receiver of Inland and

the trustees thereof hereinafter mentioned, *due to the conspiracy* herein set forth, were unable to sell a sufficient amount of gas to pay the fixed charges or to meet the sinking fund requirements on the outstanding bonds and debentures of Inland or to provide a fund for the payment of any dividends on its stock or to earn sufficient to discharge the deficits accumulated by Inland prior to December 2, 1930, but instead, due to the conspiracy herein set forth, were forced to operate the business and affairs of Inland *at a loss at all times.*"

[par. 5 (c) (10); App. 19a.]

Paragraphs 5 (c) (11), (12) and (13), App. 20a, show how Columbia in pursuance of the objective to prevent the American Fuel & Power Company project from being carried out, obtained indirect stock control over Inland. Paragraph 5 (c) (14), App. 26a, shows that after Columbia obtained control over Inland and the other corporations which were being used in connection with the building of the pipe line from Kentucky to Detroit, it stopped all work on the project. In Paragraph 5 (c) (16), App. 27a, we find how Columbia, after obtaining control of Inland determined to continue W. E. Lockhart as its President "as he had agreed to take orders from Columbia in connection with the running of said corporations. He agreed to suspend all operations on the proposed Detroit extension, not to sell any natural gas at a price lower than 25¢ per thousand cubic feet even though Inland could have sold gas taken under the Hamilton, Carbreath and Piney contracts at prices below 25¢ and have made a profit, not to expand the markets of Inland or Kentucky Fuel and not to take any major step without the consent and approval of Columbia." As Lockhart carried out the orders received from Columbia, Columbia and its co-conspirators determined to have him made receiver of Inland, which was done on December 2, 1930 [par. 5 (c) (16)]. App. 27a.

"After the appointment of Lockhart as receiver of Inland and receiver of Kentucky Fuel as aforesaid, he continued as he had agreed to do and took orders from Columbia and its officials. He reported regularly to defendants Pew and Weymouth and went to New York frequently to receive instruction from Columbia and its officers, including the co-conspirators Gossler, Reynolds, Delafield, Pew and Weymouth. Pursuant to instructions received from Columbia and said officials, he continued to refuse to sell natural gas at less than 25¢ per thousand cubic feet, he stopped all drilling operations on the Inland properties and failed and refused to expand the markets for the sale of Inland gas. Whenever opportunities were presented to sell additional gas he first consulted the co-conspirators Pew or Weymouth in order to obtain instructions from Columbia as to whether or not any additional gas should be sold. He reported to them when opportunities presented themselves to obtain new industrial gas customers in Huntington, West Virginia, Ironton, Ohio, and Portsmouth, Ohio, in order to ascertain whether they were willing to allow Inland or Kentucky Fuel to contract with said new customers for the sale and delivery of gas, or whether they desired to obtain such customers for other subsidiaries of Columbia. In all such cases he was advised not to make new gas contracts and not to expand the markets for the sale of Inland gas.

• • •

"Said W. E. Lockhart continued to act as the agent or instrumentality of Columbia at all times while he was receiver of Inland and Kentucky Fuel."

[par. 5 (c) (17); App. 30a.]

In 1935 he was appointed a Trustee of Inland.

"The said W. E. Lockhart continued to act as the agent and instrumentality of Columbia after he was

appointed trustee, in the same manner as he had acted when acting as receiver of Inland * * *."

[par. 5 (c) (17); App. 31a.]

He continued as Receiver until June 30, 1937 [par. 5 (c) (17)]. App. 31a.

The amended complaint sets forth how Lockhart, on instructions from Columbia, did not cancel the burdensome gas purchase contracts Inland had, to Inland's injury and damage [par. 5 (c) (20) to (23), incl.]. App. 34a-40a. This was done in order to prevent the gas called for by said contracts from being transmitted and sold in competition with Columbia.

"* * * but for the aforesaid acts of Columbia, the gas called for under said contracts would have been taken for sale in Detroit without any loss to Inland and without Inland having been forced to breach said contracts and thereby become injured and damaged in said sum of $4,513,177.94 * * *."

[par. 5 (c) (21); App. 37a.]

Committees acting "as instrumentalities of Columbia" proposed a Plan of Reorganization on July 15, 1937, which would have given Columbia direct stock control of Inland [Amended Complaint, par. 5 (c) (18)]. App. 33a.

The amended complaint charges "that the said conspiracy * * * to restrain and monopolize commerce * * * has been and is a continuing one."

"W. E. Lockhart, as the agent and instrumentality of Columbia, acted in that capacity until the Thirtieth day of June, A. D. 1937. The Committees, which were created by Columbia, and as such have been its instrumentality at all times since December 1, 1930, promulgated a Plan of Reorganization on the 15th day of February, 1937, and amended it and promulgated it as amended on July 15, 1937, under which control of

the properties of Inland and Kentucky Fuel upon consummation thereof would be in Columbia as Columbia and its co-conspirators planned.

• • •

"*The injury and damages* to the business and property of Inland and the Trustees thereof *have also been continuous* at all times since November 6, 1930, in that, *due to said conspiracy, neither Inland, the receiver nor the trustees have ever been able in any year to sell gas in sufficient quantities and at prices which would have given earnings sufficient to pay all Inland's fixed charges and sinking fund requirements, to declare and pay dividends and live up to the terms of and pay for gas taken under the contracts with Hamilton, Piney and Carbreth, as would have been done but for said conspiracy.* But for the conspiracy and acts of Columbia as aforesaid, Inland would have had earnings, under the plan of the syndicate aforesaid, sufficient in each year after 1930 to and including February 1, 1938, to meet and pay the interest and sinking fund requirements upon its First Mortgage 6½% Sinking Fund Gold Bonds, Series 'A', dated February 1, 1928, due February 1, 1938, and would have had earnings sufficient in each year after 1930 to and including February 1, 1938, to meet and pay the interest and sinking fund requirements upon its outstanding Ten-Year 7% Sinking Fund Debentures dated February 1, 1928 and would have had earnings sufficient to meet and pay the principal and interest on its 6% Gold Notes dated January 2, 1930 and would have had earnings after 1930 to and including February 1, 1938, to meet and pay the arrearages and interest upon said bonds, debentures and notes prior to the calendar year 1931 and would have had sufficient additional funds in each year after 1930 to pay dividends upon its outstanding shares of common stock."

(par. 6; App. 43a.)

Thus we find that the amended complaint in this "First Action" charges a continuing conspiracy with acts in furtherance thereof *occurring daily and causing injury and damage every day from 1930 until the filing of the amended complaint.* In the instant situation the allegations of the amended complaint show the conspiracy and show that it continued at all times at least until Lockhart was no longer a trustee of Inland, which was July 1, 1937. The overt acts are shown throughout the period. The action of the Committees in 1937 were overt acts pursuant to the conspiracy, and, we submit, Lockhart's daily mismanagement of Inland all constituted overt acts. *Injury is shown daily in that the result of the conspiracy and the overt acts prevented Inland from selling gas, and this injury is shown to have resulted in daily damages to Inland to at least July 1, 1937. In other words, the causes of action specified in the amended complaint show that really separate causes accrued every day to July 1, 1937.*

These causes of action in the amended complaint are ones which did not accrue prior to January 1, 1931, as the parties stipulated the cause of action in the "Second Action" had. See Affidavit of Arthur G. Logan in opposition to motion for summary judgment for reasons stipulation was entered into and use made of it to show that the cause of action, if any, asserted in the "Second Action" had completely accrued by January 1, 1931. App. 120a.

As, therefore, the cause of action in the "Second Action" was one which the parties stipulated had accrued prior to January 1, 1931, which means that all elements thereof had come into existence, while the causes of action in this "First Action" involve a continuing conspiracy operating to the date of the filing of the amended complaint, with injuries occurring and damages resulting daily from 1930 to the date of the filing of the amended complaint, these causes of action cannot be the same.

D. The Mendez Case, Relied on by the Courts Below, Is Not Applicable to the Instant Situation.

The *F. L. Mendez & Co. v. General Motors Corporation* case, 161 F. 2d 695, which is the sole case relied on by the courts below to sustain the conclusion that causes of action based on violations of different sections of the anti-trust laws are not different, is not applicable.

There, the wrong complained of consisted of a single act which was the cancellation of the contract. The reasoning of the court seems to be that as a single wrongful act was complained of in each case, there was involved only one cause of action. The casual way in which the court had dismissed the *United Shoe Machinery Corp.* case in the original opinion by saying it involved a prosecution by the Government, must lead to the conclusion that the opinion is not entitled to any real weight. On rehearing, the court admitted its error but held to the view that only one cause of action was involved, as there was "but a single wrongful invasion of a single primary right." The problem before us is entirely different.

The cause of action in the "Second Action" was one which the parties stipulated had accrued prior to January 1, 1931. The elements making up said cause of action had, therefore, all come into existence by that time. On the other hand, this "First Action" is one involving a conspiracy continuing to the date of the filing of the amended complaint, with injury occurring daily, to the damage of Inland and its trustees. We do not have a situation such as was present in the *Mendez* case where the same single wrong was involved in the two actions. We are concerned with one set of wrongs which were completed prior to January 1, 1931, and another set of wrongs occurring daily to the date of the filing of the amended complaint.

The *Mendez* case apparently adopts the pragmatic approach to ascertain what is a cause of action, contended for by Dean *Clark* in his work on *Code Pleading.* This view

has not been accepted by this Court. See *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62, at 68, 77 L. ed. 619, at 623. In an exhaustive article appearing in 21 *Oregon Law Review* 319, Ernst Schopflocher criticizes the pragmatic view in an article entitled: "What is a Single Cause of Action for the Purpose of the Doctrine of *Res Judicata?*" Even Dean Clark seems to doubt that the pragmatic approach should be used in dealing with questions of *res judicata* and the splitting of causes. Clark, *Code Pleading*, 2d Ed., p. 144.

As the *Mendez* case involved a different situation than the one we are dealing with, and as it adopts a view of a cause of action not in harmony with the views of this Court as expressed in the *United Shoe Machinery Corp.* case, *supra*, we submit that it should not be given any consideration.

II. The Rule Adopted in Holmberg v. Armbrecht, 327 U. S. 392, 90 L. Ed. 743, That State Statutes of Limitations Cannot Be Availed of to Bar Enforcement of Suits in Equity in a Federal Court on a Federally-Created Right, Should Be Enlarged to Apply on the Law Side and, if So, the Petitioner Should Be Relieved From the Effects of the Prior Adjudication.

There is no federal statute of limitations for anti-trust actions.[1] Accordingly, the statutes of the state in which the action is brought have been applied in a great many anti-trust cases. However, in recent years this Court has begun to revise its rulings with respect to the application in federal courts of state statutes of limitations to federally-created rights.

This Court has already adopted the rule that state statutes of limitations cannot be availed of to bar enforcement of a suit in *equity* in a federal court on a federally-

1. A bill is now pending in Congress to provide a 6 year period for anti-trust actions. H. R. 1986.

created right. *Holmberg v. Armbrecht,* 327 U. S. 392, 90 L. ed. 743.

In *Angel v. Bullington,* 330 U. S. 183, 91 L. ed. 832, Mr. Justice Frankfurter, speaking for the majority, said (91 L. ed. 838):

> "Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State."

Angel v. Bullington was concerned with a cause of action created by state law and jurisdiction of the federal court was invoked on the ground of diversity of citizenship.

The rationale of the diversity cases since *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. ed. 1188, has been that federal courts will refuse to enforce right which would be barred to the litigant in the state court a block away. The reason for the doctrine of *Erie v. Tompkins* has never had application to causes of action based upon federally-created rights enforceable only in federal courts.

Causes of action based upon violations of the anti-trust laws in particular should be excluded from the operation of the rule that a state statute of limitations applies because such violations usually occur in several states. The fact that state statutes of limitations have been applied to anti-trust suits has led to some ludicrous results. Thus, if a civil anti-trust action based on a continuing conspiracy is begun in the District Court for the District of Kentucky, the action is barred by a one-year statute of limitations.[2] If the action is begun in the District Court for the District of Columbia, a three-year statute of limitations applies.[3] If the action is begun in the District

2. *Kentucky Telephone Co. v. Southern Bell Telephone and Telegraph Co.,* (C. C. A. 6, 1934) 73 F. 2d 333.

3. *Foster and Kleiser Co. v. Special Site Sign Co.,* (C. C. A. 9, 1936) 85 F. 2d 742.

Court for the District of New York, a six-year statute of limitations applies.[4]

The instances of such variations with respect to the enforcement of federally-created rights have occurred time and time again. There are many cases in the reports dealing with the application of the statute of limitations to civil anti-trust suits. In many of them, the action has been barred because of a state statute of limitations. The fact that so many actions have been barred reveals that the public policy of the United States, as embodied in the anti-trust laws, i. e., maintenance of competition, is being circumvented by an arbitrary application of a rule that results in no uniformity.

Because of the very nature of civil anti-trust suits, the events which go to make up the cause of action often occur in several different states. In *Cope v. Anderson*, 331 U. S. 461, 91 L. ed. 1602, Mr. Justice Black, speaking for the majority, held that the statute of limitations of the state in which the crucial events occurred should govern a case based on a federally-created right. This, of course, is no answer to the cases where the crucial events occur in several different states, as in the instant case. What reasoning or policy can support the rule that the statute of limitations of the state of the forum should govern in such a case? Obviously, none! The application of the rule that the limitation statute of the state of the forum should govern has been a mechanical application which has resulted in private litigants being deprived of their rights and which has resulted in emasculating the federal public policy against anti-trust violations.

As we have seen, this Court has held that no statute of limitations applies to a cause of action based on a federally-created right which is brought in equity. The anti-trust laws also provide equitable remedies and, in fact, a plaintiff may ask for an injunction against anti-trust

4. *Pastor v. American Telephone and Telegraph Co.*, (D. C. N. Y., 1940) 76 F. Supp. 781.

violations and also damages. *Columbia River Packers Ass'n. v. Hinton,* 34 F. Supp. 970, rev'd on other grounds, 315 U. S. 143, 86 L. ed. 750. Presumably then, if, in the instant case, the amended complaint had contained a prayer for injunction as the primary relief, under the rule of *Holmberg v. Armbrecht, supra,* no statute of limitations would apply. Of course, in the instant case nothing would have been gained by asking for an injunction since the complained-of acts had already occurred and had already damaged Inland.

That this Court does not blindly follow rules of law, which in effect weaken the enforcement of public policies designed to stabilize the social and economic problems of the nation, is revealed by the statistics in an article entitled "Stare Decisis" by Mr. Justice Douglas in 49 *Col. L. Rev.* 735. In that article it is pointed out that from 1937 until the present time, the Court in thirty cases has overruled earlier decisions, and the great majority of these cases so overruled had been decided within the previous twenty years. Thus, the Court has realized that in retrospect rules of law once considered inviolate are no longer valid in modern society. As Mr. Justice Douglas said: (49 *Col. L. Rev.* 735)

> "This search for a static security—in the law or elsewhere—is misguided. The fact is that security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts. There is only an illusion of safety in a Maginot Line. Social forces like armies can sweep around a fixed position and make it untenable. A position that can be shifted to meet such forces and at least partly absorb them alone gives hope of security.
>
> "I speak here of long-term swings in the law. I do not suggest that *stare decisis* is so fragile a thing as to bow before every wind. The law is not properly

susceptible to whim or caprice. It must have the sturdy qualities required of every framework that is designed for substantial structures. Moreover, it must have uniformity when applied to the daily affairs of men."

We submit that the desired uniformity in the application of limitations to civil anti-trust suits can only be accomplished by a Congressional enactment, but in the absence of a federal limitations statute, no statute of limitations should be applied.[5] We believe that result should be applied to the instant case and respectfully request this Court to take the step.

The decision in the *Holmberg v. Armbrecht* case, *supra,* was in 1946 after the dismissal of the "Second Action," on the grounds of limitations. The *Holmberg* decision was the first time this Court definitely ruled out state statutes of limitations as being applicable to a federally-created right. That was in a case on the equity side. However, we believe that this Court should apply the same rule to cases on the law side, and injustice will result to plaintiff if this Court should hold that the judgment in the "Second Action" constitutes a final determination and is a collaterial estoppel insofar as it determines as a matter of law that the Delaware three-year statute is applicable. Former adjudications on questions of law, such as the judgment involved here, are not conclusive between the parties if injustice would result. *Restatement of the Law, Judgments,* § 70, p. 318, and see 1948 Supplement reading: (p. 340)

"f. *Where injustice would result.* The determination of a question of law by a judgment in an action is not conclusive between the parties in a subsequent action on a different cause of action, even though both causes of action arose out of the same subject matter or transaction, if it would be unjust to one of the par-

5. See note, 49 *Yale Law Journal* 738.

ties or to third persons to apply one rule of law in subsequent actions between the same parties and to apply a different rule of law between other persons."

CONCLUSION.

A writ of certiorari should be granted in order that this Court may review the decision of the United States Court of Appeals for the Third Circuit and reverse its decree.

Respectfully submitted,

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